NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF NEBRASKA,

Respondent,

vs.

RASHAD WASHINGTON,

Petitioner,

On Petition for Writ of Certiorari to the
Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was Mr. Washington convicted under a statute, Neb Rev. Stat. § 28-1212.04 that is void on its face by using territorial definitions of application that make the statute applicable to 1.80% of the area of the Nebraska but encompasses 95% of the Nebraska's African-American population? Does this territorial limitation immunize the white rural majority population from prosecution for the identical conduct in violation of the Equal Protection Clause of the Fourteenth Amendment? Is this law the quintessential use of territorial restrictions ringing of The Black Codes and Jim Crow Laws? Based on *Class v. United States*, ___ U.S. ___, 138 S.Ct. 798 (2018) can there be a procedural default where the claim is that the statute is facially unconstitutional. Should this court should accept this case under S.Ct. R. 10 (c) because the Nebraska Supreme Court has decided an important question of federal law by invoking procedural default to preclude consideration on the merits of a facially unconstitutional statute, Neb. Rev. Stat. § 28-1212.04, that conflicts with the relevant decision of this Court in *Class v. United States*, *supra* ?

LIST OF PARTIES

The Petitioner is Rashad Washington. The Respondent is Doug Peterson, Attorney General of Nebraska.

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IN THE

SUPREME COURT OF THE UNITED STATES

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The Petitioner, Rashad Washington, respectfully prays that a writ of certiorari issue to review the Judgement of the Nebraska Supreme Court.

OPINION BELOW

On December 7th, 2018, the Nebraska Supreme Court overruled Washington's Motion for Rehearing.

JURISDICTION

The Nebraska Supreme Court's jurisdiction was authorized by the Constitution of the State of Nebraska, Article I, Section 23, *Neb. Rev. Stat.* §25-1912(1), and *Neb. Rev. Stat.* §29-2301. Nebraska Supreme Court overruled Washington's Motion for Rehearing December 7th, 2018. (*Appendix A-3*) This Petition for Writ of Certiorari is timely filed within ninety (90) days of the judgement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This is a criminal prosecution in which Appellant, Rashad Washington, was convicted of Discharging a Firearm in Certain Cities, Villages, and Counties, a Class IC felony in and Use of a Deadly Weapon to Commit a Felony,

a Class IC felony. The issue presented to the court below at the re-sentencing hearing on remand was whether Neb. Rev. Stat. § 28-1212.04 is unconstitutional on its face in violation of the prohibition against local and special laws contained in Neb. Const. Art. III, § 18 and the equal protection clauses of the fourteenth amendment to the United States Constitution.

The district court denied the motion to vacate the convictions not on the merits, but on procedural grounds.

REASONS FOR GRANTING THE WRIT

I. BACKGROUND OF THE CASE

A. The Offense Conduct

Mr. Washington is an African-American male who resided in Douglas County, Nebraska at the time of his arrest and this prosecution. Mr. Washington was charged with *Neb. Rev. Stat.* §28-1212.04 (2010 Cum Supp.) "discharging a firearm in certain cities, villages and counties" and "use of a deadly weapon to commit a felony."

After a jury trial, Washington was found Appellant guilty of all nine counts he was charged with. The conviction for use of a weapon in count IX was derivative of and dependent upon a conviction in count VIII. Only the convictions on these two counts are at issue in the petition.

Washington was sentenced and re-sentenced due to issues that are not germane to this petition.

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Washington was sentenced and re-sentenced due to issues that are not germane to this petition.

On the appeal below, the Nebraska Supreme Court was asked to take judicial notice of the United States 2010 census and its results. The total geographical area of the State of Nebraska is 76,824.17 square miles, the area of Douglas County is 328.46 square miles, and Lancaster County is 837.55 square miles. Omaha is a city of the "metropolitan class" and Lincoln is a city of the "primary class." See, Neb. Rev. Stat. § 14-101, Neb. Rev. Stat. § 15-101. Within both Douglas County and Lancaster County are smaller cities of the second class, villages, and significant rural areas. There are only thirty "cities of the first class" as defined by Neb. Rev. Stat. § 16-101. The geographic area of the cities of the first class outside of Douglas and Lancaster County is 214.31 square miles. The total geographic area of the State of Nebraska consisting of cities of the second class, villages, and rural areas (EXCLUDING those areas within Douglas and Lancaster counties) that are immune from criminal enforcement for the conduct described in Neb. Rev. Stat. § 28-1212.04 (2010 Cum. Supp.) is 75,441.94 square miles, or 98.20% of the State of Nebraska.

The total population of Nebraska in 2010 was 1,826,341. Of that total population, there were 1,572,838 white only inhabitants (86.27%), and 82,885 African-Americans/black inhabitants (4.54%). Within the 1.80% of the State where enforcement of Neb. Rev. Stat. § 28-1212.04 (2010 Cum. Supp.) is authorized, there are 79,002 African-American/black inhabitants. This number represents 95.32% of the African-American/black inhabitants in the

entire State. In contrast, this same 1.80% area of enforcement includes only 64.86% of the total number of white inhabitants.

Within the 98.20% of the area of the State where immunity from prosecution for the identical conduct has been created, there are only 3,883 African-Americans/blacks. This represents approximately 4.68% of the State's total population of African-Americans/blacks. However, in this same geographic area of immunity there are 552,641 white only inhabitants or 35.17% of the total white only population for the State.

The Legislative history of the Neb. Laws 2009, LB63 § 20, which established this offense, and the follow-up amendment in Neb. Laws 2010, LB817 which limited the scope to the territorial boundaries of any city of the first class or county containing a city of the metropolitan class or primary class, is replete with racial code words, such as "gangs", "gang members", "gang violence", "gang recruitment", "gang graffiti", "drive-by shootings", "street violence", and clearly identified African/American neighborhoods in Omaha, such as "21st and Parker". See, Judiciary Committee hearing ref: LB63. at p. 18, 32 (2/20/09), Floor debate ref:AM212 to LB63 at p. 3) (3/11/09), Floor debate on LB817 at p. 23 (2/25/10),

As of January 1, 2013, the exercise of "prosecutorial discretion" within this 1.80% of the territory of Nebraska where Neb. Rev. Stat. § 28-2121.04 applies has resulted in 23 African-American defendants being charged out of a population of 79,002 for a charging rate of 291 per 100,000, 20 Hispanic

defendants being charged out of a population of 141,599 for a rate of 141 per 100,000, and 7 white defendants charged out of a population of 1,020,191 for a rate of 6.9 per 100,000. On the basis of population, African-Americans are 42 TIMES more likely to be charged than whites and Hispanics are 20 TIMES more likely to be charged that whites.

The Argument on Appeal

Mr. Washington attempted to raise the "merits" of the constitutional challenges of Neb. Rev. Stat. § 28-1212.04 (2010 Cum. Supp.) in 2014, through an ineffective assistance of counsel claim, but the Court of Appeals declined to reach the assigned error, finding an insufficient record. The case was remanded for other reasons. (*Appendix A-1*)

Upon remand, Washington again attempted to vacate his conviction under § 28-1212.04 but the district court concluded that it lacked jurisdiction. (*Appendix A-2*). Washington's motion for rehearing was overruled 12/7/2018. (*Appendix A-3*)

II. NEB. REV. STAT. § 28-1212.04 IS UNCONSTITUTIONAL ON ITS FACE IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

On the "merits" of the constitutional challenges, Mr. Washington filed a motion to vacate his conviction as to Count VIII on the grounds that Neb. Rev. Stat. § 28-1212.04 is facially unconstitutional. The facial grounds alleged in his

motion were that Neb. Rev. Stat. § 28-1212.04 is unconstitutional on its face because:

a. It creates specific geographic areas of enforcement verses other areas of immunity for the identical conduct without any rational basis for the distinction in violation of the Equal Protection Clauses and the Fourteenth Amendment to the United States Constitution, and

b. It invidiously discriminates against a protected class because African-Americans, such as Mr. Washington, (and other minorities) are disproportionately represented in the area of enforcement in violation of the Equal Protection Clauses of, the Fourteenth Amendment to the United States Constitution.

No appellate review on the merits has ever been conducted to whether Neb. Rev. Stat. § 28-1212.04 is unconstitutional in *any* respect.

In *Class v United States*, 16-424 (February 21, 2018), under the Supremacy Clause contained in Art. VI, cl. 2 of the United States Constitution, a state procedural rule cannot be used to bar consideration of the merits of the facial unconstitutionality of a statute under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

A criminal conviction and incarceration based on a facially unconstitutional statute violates a fundamental substantive right of the

defendant. Substantive rules include "[constitutional] rules forbidding criminal punishment of certain primary conduct," as well as "[constitutional] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934 (1989). These substantive rules are constitutional guarantees that place certain criminal laws and punishments beyond the State's power to seek conviction and imprisonment. In contrast, procedural constitutional rules are intended to enhance the reliability and accuracy of a conviction by the manner in which the trial and/or sentencing may be conducted.

A conviction or sentence imposed under a law that is facially unconstitutional is a violation of a substantive rule. The state courts have no authority to leave an unconstitutional conviction in place, regardless of whether the sentence is "final" under state law because the sentence has been affirmed following direct appeal. E,g., *State v. Castanda*, 287 Neb. 289 (2014) (direct appeal).

As previously stated, this Court along with the Eighth Circuit have rejected the use of procedural default as a justification for a prisoner's incarceration under a facially unconstitutional statute. This Court in *Montgomery v. Louisiana*, 577 U.S. ___, 136 S.Ct. 718, 731-2 (2016) relied on upon the "supremacy clause" of Art. VI, cl. 2, and reaffirmed existing law and held that a " penalty imposed pursuant to an unconstitutional law is no less

void because the prisoner's sentence became final before the law was held unconstitutional."

II. NEB. REV. STAT. § 28-1212.04 VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION UNDER THE "RATIONAL BASIS" TEST.

The Equal Protection Clause of the Fourteenth Amendment has long been interpreted being as meaning that it is "essentially a direction that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985); see also *Plyler v. Doe*, 457 U.S. 202, 216 (1982). Under this standard of review a statute will be presumed to be valid if the classification drawn by the statute is rationally related to a legitimate state interest. *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973); *Romer v. Evans*, 517 U.S. 620 (1996); *Nordlinger v. Hahn*, 505 U.S. 1, 11-12 (1992). Economic or tax legislation under rational basis review normally pass constitutional review. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955). However, when a law exhibits such a desire to harm a politically unpopular group, the Supreme Court has applied a more searching form of rational basis review.

In *Department of Agriculture v. Moreno, supra*, a law preventing those households containing an individual unrelated to any other member of the household from receiving food stamps violated equal protection. The purpose

of the law was to "discriminate against hippies." The governmental interest in preventing food stamp fraud was not deemed sufficient to satisfy rational basis review. See, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (discrimination in distribution of contraceptives between married and unmarried persons failed rational basis test.)

The fundamental problem with Neb. Rev. Stat. § 28-1212.04 is that while the State may have a legitimate interest in prohibiting shooting of a firearm from a vehicle, there is not a rational and articulable interest in making such conduct prohibited in 1.80% of the state and immune in the other 98.20%. How are the rural, villages, and second class cities of Douglas and Lancaster County different than the same areas in the rest of the state? How is discharging a firearm from a vehicle at a structure in Douglas or Lancaster County different that discharging a firearm at a structure in Wahoo, Nebraska? See, *Green v. State*, 83 Neb. 84, 119 N.W. 6 (1908).

This is not a statute that is limited to areas of the greatest population "density." Douglas County has substantial areas that are rural. In fact, Lancaster County is overwhelmingly rural. However, the population density of Wahoo, Nebraska (a 2nd class city and not covered by Neb. Rev. Stat. § 28-1212.04) is 4,508 residents/2.65 miles^2 = 1,701) is greater than Douglas County (1,524) or Lancaster County (337). The population density of Sarpy County (640) is greater than the density of Lancaster County (337). In fact, the

majority, if not ALL, of the cities of the second class have a greater population density than that for Lancaster County and similar to that for Douglas County.

III. NEB. REV. STAT. § 28-1212.04 INVIDIOUSLY DISCRIMINATES ON THE BASIS OF RACE SINCE THE 1.80% AREA OF ENFORCE CONTAINS 95% OF THE AFRICAN AMERICAN RESIDENTS OF NEBRASKA IN VIOLATION OF THE "STRICT SCRUTINY" TEST OF THE EQUAL PROTECTION CLASE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Mr. Washington is an African-American male and resident of Douglas County which is in the 1.80% of the area of the State where Neb. Rev. Stat. § 28-1212.04 applies. There are 79,002 African-American/black inhabitants in this 1.80% of Nebraska as shown by 2010 Census data (95.32% of the State's total.) This 1.80% includes only 64.86% of the total number of white inhabitants.

Within the 98.20% of the area of the State where immunity from prosecution has been created, there are only 3,883 African-Americans/blacks. This represents approximately 4.68% of the State's total population of African-Americans/blacks. However, in this same geographic area of immunity there are 552,641 white only inhabitants or 35.17% of the total white only population for the State.

Although Nebraska may believe that it has not engaged in overt *de jure* discrimination against African-Americans during the post-Civil War period

through specific "Jim Crow" laws, that is not historically accurate. Nebraska was one of the states that criminalized and declared void inter-racial marriage involving a white person and anyone 1/8th "Negro" until the early 1960s. See, Neb. Rev. Stat. § 42-103 (Comp. Stat 1929) "Indians and negroes" were not competent to testify by statute in many cases until approximately 1913. *Priest v. State*, 10 Neb. 393, 6 N.W. 468 (1880), *Pumphrey v. State*, 84 Neb. 636, 122 N.W.19 (1909).

The legislative history of Neb. Laws 2009, LB 63 demonstrates that it was intended to be an "Omaha" law to address a "certain type of person," but also intended to prevent making the same law applicable to 98% of the State that is overwhelming white and rural. Discrimination based on race is not solely defined by the example the 50's and 60's. It is just as insidious and harmful to all residents, black or white, when a criminal statute uses geographic definitions to disproportionately impact a suspect class. Neb. Rev. Stat. § 28-1212.04 need not use the words "African-American" to be discriminatory. The effect is discriminatory because the crime can only be enforced in the geographic areas where 95% of Nebraska's African-Americans live.

The United States Supreme Court invalidated an Alabama law disenfranchising persons from voting who were convicted of crimes involving moral turpitude. There was evidence that the State had enacted the provision for the purpose of disfranchising blacks, and indisputable evidence that the

state law had a discriminatory effect on blacks as compared to similarly situated whites. Blacks were "'by even the most modest estimates at least 1.7 times as likely as whites to suffer disfranchisement under the law in question". *Hunter v. Underwood*, 471 U.S. 222, 227, 105 SCt 1916, 1919-20 (1985) (quoting *Underwood v. Hunter*, 730 F.2d 614, 620 (11th Cir. 1984))

In *Pleasant Grove v. United States*, 479 U.S. 462, 107 S.Ct. 794 (1987), the Supreme Court held that Pleasant Grove, Alabama engaged in purposeful discrimination by annexing all-white areas while rejecting the annexation request of an adjacent black neighborhood. In their actions, Pleasant Grove never used the words "Negro," "Black," or "African-American," but the city's actions had "shown unambiguous opposition to racial integration, both before and after the passage of the federal civil rights laws. " Its strategic annexations appeared to be an attempt "to provide for the growth of a monolithic white voting block" for "the impermissible purpose of minimizing future black voting strength."

Could Nebraska have been even more specific in the territorial restrictions? What if the crime was defined as only applicable to the legislative district north of Dodge Street and east of 72nd street? The problem with gerrymandering criminal areas of enforcement is that those senators whose constituents are not affected by the law don't care about the penalty to be imposed. If the senator represents a predominately rural areas, his or her

constituents are not affected by convicting and incarcerating Omaha African-Americans to a man/min 5 years under a FIC felony.

IV. UNDER THE SUPREMACY CLAUSE CONTAINED IN ART. VI, CL. 2 OF THE UNITED STATES CONSTITUTION, A STATE PROCEDURAL RULE CANNOT BE USED TO BAR CONSIDERATION OF THE MERITS OF THE FACIAL UNCONSTITUTIONALITY OF A STATUTE UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION.

The Supreme Court of Nebraska was correct in pointing out at oral argument that *Montgomery v. Louisiana* concerned the retroactivity of a statute which was determined to be unconstitutional. And the court's October 26, 2018 opinion is also correct in stating that "the statute which Washington argues is unconstitutional has not yet been found to be unconstitutional," But the *Class* opinion refers to *United States v. Ury*, 106 F.2d 28 (CA2 1939). Ury plead guilty to removing identifying marks from generators imported from foreign countries in violation of the "Tariff Act of 1930." On appeal he contended the statute was unconstitutional. The Federal Circuit Court affirmed the district court, holding that the statute was, in fact valid. However, as *Class* points out, the *Ury* court determined that the plea of guilty did not foreclose Ury, who argued that the statute was unconstitutional, "from the review he now seeks." In doing so, this Court in *Class* cited an earlier case, *Hocking Valley R. Co. v. United States*, 210 F. 735 (CA6 1914), which held

that a defendant may raise the claim that, because the indictment did not charge an offense no crime has been committed, for it is "the settled rule that," despite a guilty plea, a defendant "may urge" such a contention "*in the reviewing court.*" (Emphasis added) See also *Carper v. State*, 27 Ohio St. 552, 575 (1875) (same).

Washington refers to these cases because at oral argument, Washington asked this court to review the constitutionality of Neb. Rev. Stat. § 28-1212.04 (2010 Cum Supp.) The court had before it the record form the district court, which contained the geographical and statistical information made in "the offer of proof" at the district court, to be able to review the claim. The court denied Washington the review. He is entitled to this review either by this court or upon remand back in the lower court.

CONCLUSION

Petitioner Rashad Washington respectfully request this Court to grant certiorari in this matter. In *Class,* this court determined that under the Supremacy Clause contained in Art. VI, cl. 2 of the United States Constitution, a state procedural rule cannot be used to bar consideration of the merits of the facial unconstitutionality of a statute under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution on direct appeal. This case involved a direct appeal. But the Nebraska Supreme Court didn't discuss *Class*, or even acknowledge its existence even though it was used and

referred to as argument in Washington's reply brief. (*Class* was filed February 21, 2018, Washington's reply brief was filed April 7th, 2018)

Class held that the plea agreement, the plea of guilty and the federal rules of criminal procedure "did not expressly or implicitly waive Class's right to raise on appeal his claim that he could not be constitutionally prosecuted" *Id. at 16.* Based on *Class* there cannot be procedural default where the claim is that the statute is facially unconstitutional. It is difficult to imagine why there should be a distinction here. This distinction is untenable. Under both scenarios, the substantive constitutional harm is the same. Mr. Washington has been convicted under a statute § 28-1212.04 that is void on its face and beyond the power of the State to charge and convict. Surely it offends our system of ordered liberty to permit a prisoner to remain incarcerated when the statute under which he was convicted exceeded the legislatures power to enact.

This court should summarily reverse the lower court and remand with directions to take up Washington's claims in light of *Class.* See also *Ward v. United States,* 139 S.Ct. 66, __U.S.__, 202 L.Ed.2d, (2018) and *Wolfe v. Virginia,* 586 U.S. __, 18-227 (Jan 7, 2019) ("The petition for a writ of certiorari is granted. The judgement is vacated, and the case is remanded to the Supreme Court of Virginia for further consideration in light of Class v. United States, 583 U.S. __ (2018).")

RESPECTFULLY SUBMITTED,

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APPENDIX

Appendix A-1 *State v. Washington (NOT DESIGNATED FOR PERMANENT PUBLICATION) (Filed 12/29/2016.)* - Opinion on direct appeal by the Nebraska Court of Appeals.

Appendix A-2 *State v. Washington (Filed 10/26/201.)* - Opinion on direct appeal by the Supreme Court of Nebraska.

Appendix A-3 *State v. Washington* (entered 12/7/2019)- Petitioner's motion for rehearing overruled by the Nebraska Supreme Court.

CERTIFICATE OF COMPLIANCE

No. 19-

STATE OF NEBRASKA,

Respondent,

vs.

RASHAD WASHINGTON,

Petitioner,

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of Certiorari contains 3282words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 3-7-2019, 2019